IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-679

INTERNAL REVENUE SERVICE,
Petitioner,
v.
FREUHAUF CORPORATION, et al.,
Respondents.

RESPONSE TO MOTION TO VACATE AND REMAND TO THE COURT OF APPEALS

MOTION TO DISMISS WRIT OF CERTIORARI AND TO REMOVE STAY

JOHN L. KING
MATTHEW C. MC KINNON
BERRY, MOORMAN, KING, LOTT & COOK, P.C.
2600 Detroit Bank & Trust Building
Detroit, Michigan 48226

MILTON J. MEHL
MEHL, WILLIAMS, CUMMINGS & TRUMAN
2012 Continental Life Building
Fort Worth, Texas 76102

WILLIAM A. BARNETT
135 S. LaSalle Street
Chicago, Illinois 60603

GERALD C. RISNER
135 S. LaSalle Street
Chicago, Illinois 60603

Attorneys for Respondents

Interstate Brief & Record Co. 1615 Abbott St. Detroit, Michigan 48216
962-9745

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-679

INTERNAL REVENUE SERVICE,
Petitioner,
v.
FREUHAUF CORPORATION, et al.,
Respondents.

RESPONSE TO MOTION TO VACATE AND REMAND TO THE COURT OF APPEALS

MOTION TO DISMISS WRIT OF CERTIORARI AND TO REMOVE STAY

Respondents urge the Court to deny petitioner's motion to vacate the judgment of the court of appeals and move to dismiss the writ of certiorari and to remove the stay of the judgment of the district court.

1. At the time this action was commenced, respondents were defendants in an excise tax criminal prosecution in the United States District Court for the Eastern District of Michigan.

On October 11, 1972, respondents, as defendants in said criminal action, in order to obtain information vital to their defense, filed a motion for discovery and inspection and a motion for discovery of exculpatory information.

In his memorandum and orders, dated June 21, 1973, the Honorable Thomas P. Thornton, United States District Judge, presiding, wrote as follows:

> "In the Defendants' Motion for Disclosure of Exculpatory Information the Defendants have made a request similar to that contained in paragraph 6 of their Motion for Discovery and Inspection. *In its response the Government concedes that* under Sec. 552(a) (3) of the 5 USC (The Freedom of Information Act) the Internal Revenue Service records (except privileged or confidential trade secrets and commercial or financial information obtained from a taxpayer) are available to any person under proper request for identifiable records, and refers Defendants to 26 CFR, Sec. 601.702(c)." (Emphasis added).

Following procedures set out in the Freedom of Information Act, hereinafter referred to as the FOIA, 5 U.S.C. §552, respondents on June 26, 1973, submitted written requests to the Internal Revenue Service for certain excise tax private letter rulings, technical advice memoranda, underlying correspondence and files and index cards for the period from January 1, 1947 to

September 13, 1973, pertaining to specific excise tax information under Section 4216 of the Internal Revenue Code. Final appeal was denied *in toto* by the Commissioner of Internal Revenue on August 22, 1973, citing exemptions 3, 4, 5 and 7 of the FOIA, 5 U.S.C. 552(b). On September 14, 1973, the present action was filed. (Res. App. 8).

The respondents immediately moved for a preliminary injunction against petitioner. (Res. App. 25). The petitioner in turn, moved for a summary judgment claiming that all the requested documents were exempt from disclosure under Exemption 3 of the FOIA, 5 U.S.C. §552(b) (3), as "matters that are specifically exempted from disclosure by statute." (Res. App. 33). In substance, petitioner argued that Sections 6103 and 7213 of the Internal Revenue Code of 1954, which, by their express language apply to returns and income returns respectively, exempt "*All* documents relating to the enforcement of the Federal Revenue Laws against specific taxpayers." (Emphasis added)

The district court heard arguments on petitioner's motion for summary judgment and subsequently a trial ensued. At the trial the petitioner called only one witness and presented no evidence in support of its contention that any or all of the documents requested were returns, or part of returns within the meaning of Section 6103. Petitioner also presented legal arguments concerning exemptions 4, 5 and 7; however, no evidence was presented by petitioner to support these contentions.

2. On January 11, 1974, the district court denied the petitioner's motion for summary judgment and ruled that

respondents were entitled to disclosure of all of the documents requested stating:

> "We consider that *none of the nine exceptions has application* to the material here sought by plaintiffs and that 26 U.S.C.A. §6103 provides for the protection of the privacy of persons filing Income Tax returns. To the extent that any of the material sought by plaintiffs might constitute an invasion of the privacy of taxpayers, there are means that may be employed to avoid such disclosure. *In furnishing plaintiffs the information relative to their defense there need be no violation of Section 6103* of Title 26 of the Internal Revenue Code." 369 F. Supp. at p. 110. (Emphasis added). (Res. App. 47, 50).

On appeal, petitioner abandoned its reliance on exemptions 4, 5 and 7 and relied only on Exemption 3 of the FOIA. Petitioner continued to argue in the court of appeals that Sections 6103 and 7213 immunized all documents associated with the administration of the tax laws. The court of appeals rejected this argument, holding that it was the intent of Congress that issues of construction of the FOIA be resolved in favor of public disclosure. (Res. App. 78). The court of appeals properly recognized that the Act places the burden on the petitioner to show that nondisclosure is permitted under one of the nine specifically enumerated exemptions and that the petitioner had not met this burden. The court stated that letter rulings and technical advice memoranda were not "returns" within the meaning of Section 6103 stating it was in agreement with the rationale of the court of appeals for the district of columbia in *Tax Analysts* and *Advocates* v. *I.R.S.*, 505 F.2d 350 (D.C. Cir., 1974).

The court of appeals further held that *none of the exemptions in the FOIA* is applicable to the extent that it bar disclosure of the requested documents as a class or group. (Res. App. 78, 85) To the extent that any particular document might contain exempt information they would be subject to *in camera* inspection and deletion by the district court.

By order dated October 9, 1975, Mr. Justice Stewart stayed the judgment of the district court until final disposition of the case in this Court, in the event the government sought certiorari (423 U.S. 919). (Res. App. 101). On January 12, 1976, the Court granted the government's petition for a writ of certiorari (423 U.S. 1047).

3. The judgment of the court of appeals should be affirmed and the appeal dismissed since there would be nothing for the court of appeals to consider should this case be remanded.

It should be noted that the respondents first requested the documents involved on October 11, 1972. It is now January 1977. Throughout all of the court proceedings counsel for the government has continually attempted to harass the respondents by waiting until the last minute to file documents and briefs, seeking and obtaining extensions of time within which to file briefs and delaying oral argument. Now, petitioner again attempts further delay in a decision of the case by asking that it be remanded to the court of appeals, although the FOIA dictates speedy and preferential disposition of pending actions. 5 U.S.C. 552(a) (4) (d).

For example, on March 28, 1974, petitioner stipulated that it would continue to prepare, compile and accumulate all of the information requested at respondents' expense. (Res. App. 74, 75). Yet in its latest motion petitioner pleads that it needs an additional six (6) weeks to compile the information. (Mot. 9) Petitioner recognizes that its only substantial legal argument (Exemption 3) has vanished with the enactment of Sec. 6110. In effect, petitioner now seeks to reargue its appeal before the court of appeals hoping that a miracle will somehow occur to save its case. All attempts to assert that Exemption 5 of the FOIA should apply fail when it was not argued in the court of appeals. Respondents submit that not having argued Exemption 5 of the FOIA in the court of appeals, petitioner should not be permitted to raise it at this late hour. *Mc Grath* v. *Manufacturers Trust Co.*, 388 U.S. 241 (1949), *Dunn* v. *United States*, 284 U.S. 390 (1932). Moreover, in spite of the fact that petitioner did not brief this issue before the court of appeals it was considered and rejected by the court when it stated:

> " . . . we agree that probably none of the exemptions is applicable to the extent at least it bars disclosure of the requested documents as a class or group." (Res. App. 78, 85).

Respondents further submit that the district court in its order anticipated that there would be deletions and provided for *in camera* inspection by the court as to whether the proposed deletions are justified under the FOIA. (Pet. App. 8A). Furthermore, Exemption 5 cannot be interposed by petitioner as a blanket shield to disclosure of all of the files underlying the 23 published revenue rulings. This exemption only applies to materials

reflecting the deliberative or policy making process and not to purely factual matters. *N.L.R.B.* v. *Sears Roebuck & Company*, 421 U.S. 132 (1974), *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare*, 504 F.2d 238 (D.C. Cir., 1974).

Section 6110 of the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520 and its underlying legislative history establish that Congress did not intend that the new act in any way adversely affect pending FOIA suits such as the present case.

In the Senate debate on September 16, 1976, immediately prior to the enactment of the Tax Reform Act, the following colloquy took place:

> "MR. HANSEN. Mr. President, a question has arisen over the treatment of cases under the new rules governing disclosure of private letter rulings and related materials under section 1201(a) of the bill, which adds section 6110 to the revenue code. I would be grateful if the chairman of the committee could advise me as to whether I am correct, Mr. President, in assuming that under section 1201(b) of the bill, rulings, technical advice memorandums, background files, indexes, and card files which were or are the subject of a judicial proceeding under the Freedom of Information Act are not made subject to these new rules on disclosure? In other words, are cases such as Fruehauf Corp. against Internal Revenue Service, Supreme Court docket 75-679, in any way adversely affected by the changes contained in section 1201(a) of the bill by reason of section 1201(b)?

"MR. LONG. [Chairman of the Senate Finance Committee]. Mr. President, in answer to the Senator's question, if the Supreme Court or other Federal court, in a pending freedom of inf rmation case, affirms a taxpayer's right to disclosure of private letter rulings, technical advice memorandums, background files, *indexes* and *card files*, or other related communications and correspondence, section 1201(b) assures that section 1201(a) will in no way impede or deter the court ordered disclosure as to all the information sought in the pending cases. Similarly, if a pending freedom of information case is decided against the taxpayer, the taxpayer must look to the new law for its disclosure rights. 122 Cong. Rec. S 16023 (September 16, 1976). (Emphasis added).

Similarly in the House debates it was stated:

MR. DUNCAN of Tennessee. Mr. Speaker, section 1201(a) of the bill creates new rules governing the public inspection of written determinations made by the Internal Revenue Service and related background files. It is being enacted, in part, as a response of the need to avoid "secret lawmaking" by the Internal Revenue Service. Under Section 1201(b), rulings, technical advice memoranda, and background file information which were or are the subject of a judicial proceeding under the Freedom of Information Act are not made subject to these new rules on disclosure. For example, Mr. Speaker, cases such as Fruehauf Corp. against Internal Revenue Service, Supreme Court Docket 75-679, if decided in favor of the taxpayer,

is not in any way adversely affected by the changes contained in section 1201(a) of the bill by reason of section 1201(b). Thus, if the Supreme Court or other Federal courts, in a pending Freedom of Information case, affirms a taxpayer's rights to disclosure of private letter rulings, technical advice memoranda, background files, *indexes* and *card files*, or other related communications and correspondence, section 1201 (b) will in no way impede or deter the court ordered disclosure as to all information sought in the pending cases. 122 Cong. Rec. H 10235 — H 10236 (September 16, 1976). (Emphasis added).

Respondents are entitled to all of the material covered by the district court order of January 30, 1974, which was affirmed in its entirety by the court of appeals. (Res. App. 52).

Respondents agree with petitioner (Mot. 8) that under Sec. 6110 they are entitled to the private letter rulings, technical advice memoranda and the files underlying the 23 published rulings.

Petitioner in its motion now appears to take the position that respondents are now not entitled to the IRS letter ruling indexing system because of the new act.

Disclosure of the indices is vital to respondents. It is respondents' contention that the IRS has through the issuance of private letter rulings and technical advice memoranda given favorable tax treatment to certain taxpayers thus resulting in a discriminatory application of the revenue laws in favor of certain taxpayers. The only way to insure that all such rulings can be found is

through the use of the index system. Petitioner in its motion admits that it has already agreed to disclose over 10,000 documents. Without the indices, the search for the discriminatory rulings would amount to the search for the proverbial needle in the haystack. Petitioner has also admitted that many of the requested documents have been destroyed. Thus, in some instances the only way to obtain the desired information is through the use of the indices. Finally, the indices will serve as a cross check to determine if all of the requested documents have been disclosed by the IRS.

Respondents are entitled to the indices. As stated above, the new act was not in any way intended to adversely affect pending FOIA cases. Section 6110 was enacted in response to the flagrant disregard of petitioner to the clear mandate of Congress under the FOIA. Petitioner adopted the position that technical advice memoranda and private letter rulings are returns within the meaning of Section 6103 of the Internal Revenue Code. This was not the intent of Congress.

Section 6110 only covers IRS "written determinations" and "background files." It was not intended as the exclusive statement of the public's right to obtain other information or records from the IRS. The FOIA is still in effect and it still applies to agency records. 5 U.S.C. §552(a) (3). This is what the court of appeals correctly held. While an index card may not be a "written determination" or a "background file", it is certainly not a return or return information as the IRS previously argued. Section 1202 of the Tax Reform Act of 1976, 90 Stat. 1667, amends Section 6103 of the Code, relating to

publication of tax returns and disclosure of information concerning persons filing tax returns as follows:

* * * *

"(b) DEFINITIONS. — For purposes of this section —

(1) RETURN. — The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) RETURN INFORMATION. — The term "return information" means —

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for

any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110.

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

* * * * *

As can be seen from this definition, the terms return and return information are construed much more narrowly than the definition promulgated by petitioner in its 1972 regulation. (T.D. 7162). Both the district court and the court of appeals held the indices to be agency records and not tax returns or otherwise exempt from disclosure under any other exemption of the FOIA. Thus, no exemption exists under either the FOIA or Sec. 6110. As agency records, the indices must be disclosed as required by the FOIA.

Petitioner appears to claim that the legislative history of Sec. 6110 indicates that the existing indices are not to be disclosed. S. Rep. No. 94-938, 94th Cong. 2d Sess. 306 June 10, 1976. Such a position is untenable since petitioner has quoted the Committee's report out of context. The paragraph from which the quote in petitioner's motion is taken provides:

"Under the committee amendment, IRS written determinations, i.e., rulings, technical advice memoranda, and determination letters would

generally be open to public inspection; that is, they would be made available for public inspection and copying in a public reading room in or near the issuing office. A complete set of IRS rulings and technical advice memoranda would be made available in a central public reading room in Washington, D.C. It is intended that a subject-matter index would also be placed in the public reading rooms. This index would classify rulings, etc., on the basis of the Code sections and issues involved. (It is anticipated that, as is presently the case with respect to other aspects of the tax law, various commercial services will make pertinent parts of this material available to people located elsewhere.) However, it is not contemplated that existing IRS indices will be disclosed. The House bill achieved a similar result."

This paragraph establishes that the disclosure provisions of Sec. 6110 are intended to closely parallel Sec. (a) (2) (5 U.S.C. 552(a) (2)) of the FOIA which requires that certain agency materials must be made available to the public for inspection and copying even without a specific request. That is, each agency must in the ordinary course of its day-to-day operation provide some procedure for on-going, *voluntary* disclosure. This is what the Committee is referring to when it discusses making written determinations available in public reading rooms. It was not intended that existing IRS indices would be unavailable under the FOIA and particularly to those FOIA cases pending on January 1, 1976.

Thus, the Committee's statement that "it is not contemplated that existing IRS indices will be disclosed" S. Rep. No. 94-938, 94th Cong., 2d Sess. 306 (1976) merely means that Congress did not contemplate voluntary disclosure of existing indices. However, since these indices are obviously agency records, under Sec. (a) (3) (5 U.S.C. 552(a) (3)) of the FOIA, they must be disclosed under the judgment of the court of appeals.

Petitioner argues, (Mot.10) that the determination of the district court was a "non-final order" which can now be modified. The decision of the district court was a final order. Appeals to the court of appeals may be taken only from a final order. 28 U.S.C. 1291. Such a final order should not now be modified. The decision of this Court should be based on the facts as reported and the law as reported in the statutes at the time.

The colloquy on September 16, 1976, in the Senate and House, set out on pages 7, 8 and 9 herein which occurred subsequent to the Senate report 94-938 of June 30, 1976, clearly states that it remains the intent of Congress that the requested indices be disclosed to respondents as parties commenced litigation prior to January 1, 1976.

The cases of *United States* v. *New Jersey State Lottery Commission*, 420 U.S. 371; *Bryan* v. *Austin*, 354 U.S. 933, cited by petitioner (Br. 11), do not apply in this case. In each of the cited cases while statutes were enacted by the States involved requiring remand of the cases for further consideration by the lower courts neither case contained a "grandfather clause" such as that contained in the Tax Reform Act of 1976, Pub. L. 94-455, Section 1201(b), 90 Stat. 1667. Section 1201(b)

specifically exempted judicial proceedings commenced under 5 U.S.C. 552 prior to January 1, 1976. In addition, in the *New Jersey* case 18 U.S.C. Sec. 1307(a) (2) was enacted subsequent to the appeal making Section 1304 inapplicable to the case. In *Bryan*, the State after Certiorari was granted repealed a law requiring written disclosure of a teacher's affiliation with the NAACP. The judgment of the district court was vacated and the case remanded with leave to the appellants to amend their pleadings. In the instant case Congress enacted Section 6110 of the Internal Revenue Code to broaden the rights of taxpayers and clarify the law. In doing so it very pointedly did not repeal, amend or modify in any way 5 U.S.C. Sec. 552 (the FOIA).

Respondents agree with petitioner (Mot. 10, 11) that it is beyond dispute that the new legislation has substantially resolved the major public question of the disclosure of the Internal Revenue Service excise tax letter rulings and technical advice memoranda with respect to which this court granted certiorari. The major issues having been decided in favor of respondents, the court should dismiss the appeal and permit the decisions of the district court and the court of appeals to stand. The question could well be asked "Would this court have granted certiorari if the only issues on appeal were 'the Internal Revenue Service files covering 23 published letter rulings and the Internal Revenue Services' letter rulings indexing system?' " Respondents think not!

The stalling and foot-dragging tactics of the petitioner cannot be allowed to continue. The only effect which the new legislation has on this case is to conform respondents' rights to all of the material covered by the judgments of the lower court.

In view of all of the above considerations it is respectfully submitted that Petitioner's motion should be denied and that the Writ of Certiorari be dismissed and the stay of the district court's order be removed.

Respectfully submitted.

JOHN L. KING
MATTHEW C. McKINNON
BERRY, MOORMAN, KING, LOTT
& COOK, P.C.
2600 Detroit Bank & Trust Bldg.
Detroit, Michigan 48226

MILTON J. MEHL
MEHL, WILLIAMS, CUMMINGS
& TRUMAN
2012 Continental Life Building
Fort Worth, Texas 76102

WILLIAM A. BARNETT
135 S. LaSalle Street
Chicago, Illinois 60603

GERALD C. RISNER
135 S. LaSalle Street
Chicago, Illinois 60603

Attorneys for Respondents